EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HUDSON, *individually and on behalf of others similarly situated,*

Plaintiff,

- against -

NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, RETIREMENT BOARD OF THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, KATHERINE "KATIE" BLACKBURN, RICHARD CASS. TED PHILLIPS, SAMUEL MCCULLUM, ROBERT SMITH, and JEFFREY VAN NOTE

Defendants.

18-cv-04483 (GHW) (RWL)

REPORT AND RECOMMENDATION TO HON. GREGORY H. WOODS: MOTIONS TO DISMISS

ROBERT W. LEHRBURGER, United States Magistrate Judge.

Plaintiff Christopher Hudson ("Hudson") brings this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq., on behalf of himself and other similarly situated participants in the Bert Bell/Pete Rozelle NFL Player Retirement Plan (the "Plan"). The lawsuit names the National Football League Management Council (the "Council"), National Football League Players Association (the "Association"), and the Retirement Board of the Plan (the "Retirement Board") along with the Retirement Board's six individual members—Katherine Blackburn, Richard Cass, Ted Phillips, Samuel McCullum, Robert Smith, and Jeffrey Van Note (collectively, the "Individual Board Defendants" and, together with the Council, the Association, and the Retirement Board, the "Defendants"). Hudson alleges that all Defendants have breached

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their duties under ERISA with respect to the application of certain benefits to the detriment of Hudson and other participants in the putative class.

Defendants have each separately moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(6). (Dkt. 52, 54, and 61.) For the reasons that follow, I recommend that Defendants' motions be GRANTED and the action be DISMISSED with prejudice.

Procedural Background

Plaintiff filed his Complaint on May 21, 2018 on behalf of himself and a putative class of similarly-situated Plan participants. (Dkt. 1.) Through a stipulation dated July 18, 2018, all parties agreed upon a briefing schedule for motions to dismiss the Complaint, which was adopted by the Court. (Dkt. 45.) Pursuant to that schedule, each of the Defendants—the Council, the Association, and the Retirement Board (including its six individual members)—moved for dismissal on August 31, 2018.

The Council's motion consists of (1) its Memorandum of Law ("Council Mem.") (Dkt. 53); and (2) the Declaration of Stacey R. Eisenstein in Support with Exhibits A-C ("Eisenstein Decl.") (Dkt. 55.) The Retirement Board's motion consists of (1) its Memorandum of Law ("Board Mem.") (Dkt. 57); and (2) the Declaration of Michael L. Junk in Support with Exhibits A-E ("Junk Decl.") (Dkt. 56.) The Association's motion consists of its Memorandum of Law ("Association Mem."). (Dkt. 62.)

Plaintiff filed his omnibus opposition to the motion to dismiss on October 20, 2018, consisting of: (1) a Memorandum of Law in Opposition ("Pl. Opp."); and (2) the Declaration of Daniella Quitt in Opposition with Exhibits A-B.[1] ("Quitt Decl.") (Dkt. 72 and 73.)

[1] Pursuant to the parties' July 18, 2018 stipulation, Plaintiff's omnibus opposition addresses the arguments in each of the three motions to dismiss. (Dkt. 45.)

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Each of the Defendants filed a reply memorandum of law in further support of its respective motion to dismiss on November 30, 2018. (Dkt. 74, 75, and 76.)

This case was initially assigned to the Honorable Robert W. Sweet, who held at least one scheduling conference on November 27, 2018 and then heard oral argument on the motions to dismiss on December 19, 2018, though he did not issue a decision.[2] Judge Sweet passed away on March 24, 2019, and as a result, the case was reassigned to Judge Gregory Woods. (Dkt. 79.) Judge Woods, in turn, referred the matter to the undersigned for case management as well as the resolution of the three instant motions to dismiss. (Dkt. 81.) The undersigned held a case management conference on May 9, 2019, at which time the parties discussed several discovery issues as well as the overall status of the case. (Dkt. 84.) All parties acknowledged that the resolution of the motions to dismiss would be essential in determining how best to proceed.

Factual Background[3]

A. The Parties

Hudson is a former professional football player with the National Football League (the "NFL"). He played for the Jacksonville Jaguars from 1995 to 1999, the Chicago Bears

[2] The Court confirmed with both its internal Court Reporters' Office and Plaintiff's counsel that no transcript of the December 19, 2018 argument was generated.

[3] In accordance with the standard for assessing a motion to dismiss, all non-conclusory facts described herein are derived from Plaintiff's Complaint, and accepted as true. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 275 (2d Cir. 2013). In addition to the Complaint, the Court also draws upon statements and documents incorporated into the Complaint by reference, as well as matters of which judicial notice may be taken. *See Kleinman v. Elan Corp.*, 706 F.3d 145, 152 (2d Cir. 2013) (citing *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007)). As relevant here, the Court may consider the documents annexed to the declarations of counsel submitted in connection with the motions. Most importantly, the Court may consider the full Bert Bell/Pete Rozelle NFL Player Retirement Plan, which is

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from 1999 to 2001, and finally the Atlanta Falcons from 2001 until his retirement in 2003. (Complaint ¶ 10.) Hudson played the position of safety for all eight years of his NFL career. (Complaint ¶ 31.)

The Council, based in New York City, represents the 32 clubs that employ NFL players and functions as the "collective bargaining representative of the Employers." (Complaint ¶¶ 11-12; Plan at 5, Article 1.21.) Particularly as relevant here, Article 10.2 of the Plan provides that the Council, when acting jointly with the players' Association (described below), has the power to amend the Plan. (Complaint ¶ 11; Plan at 36.) Pursuant to Article 8.1, the Council also has the authority to appoint three voting members of the Retirement Board (described below) and replace any member of the Retirement Board that the Council itself had appointed. (Complaint ¶ 11; Plan at 30.)

The Association is the labor organization representing the professional American football players in the NFL. (Complaint ¶ 12.) It functions as the collective bargaining unit for those players. (*Id.*) Again, as most relevant here, Article 10.2 of the Plan provides that the Association, when acting jointly with the Council, has the power to amend the Plan. Pursuant to Article 8.1, the Association also has the authority to appoint three voting members of the Retirement Board and to remove and replace any member of the Retirement Board that the Association had appointed. (Complaint ¶ 12; Plan at 30.)

Plaintiff alleges that both the Council (representing management) and the Association (representing the players) are fiduciaries of the Plan under ERISA, 29 U.S.C.

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annexed as Exhibit A to the Declaration of Michael Junk in Support of the Retirement Board's Motion to Dismiss (Dkt. 56-1-7), as well as the full Summary Plan Description, annexed as Exhibit B. (Dkt. 56-8.)

§ 1002(21)(A), and therefore had the responsibility to monitor the Retirement Board as an entity as well as the individual Board members. (Complaint ¶¶ 1, 11-12.)

The Retirement Board is the Plan's administrator and named fiduciary. (Plan at 2, Article 1.3.) Responsibilities of the Retirement Board include overseeing the Plan, making benefit decisions, construing the Plan's terms, reconciling inconsistences, and other aspects of managing the Plan. (Complaint ¶ 13; Plan at 30-31, Article 8.2.) The Retirement Board is composed of six voting members, three of whom are selected by the Association and three of whom are selected by the Council; the Commissioner of the NFL serves as an *ex officio* seventh member. (*Id*.; *see also* Plan at 30, Article 8.1.) Plaintiff alleges that the Retirement Board is a fiduciary within the meaning of ERISA, 29 U.S.C. § 1002(16)(A) and 29 U.S.C. § 1002(21)(A) because it exercised discretionary authority and responsibility over the Plan. (*Id*.; *see also* Plan at 30-31, Article 8.2.)

Finally, the Complaint also names six individuals identified by the Summary Plan Description (Junk Decl., Ex. B) as managing members of the Retirement Board: Katherine "Katie" Blackburn ("Blackburn"), Richard W. "Dick" Cass ("Cass"), Ted Phillips ("Phillips"), Samuel McCullum ("McCullum"), Robert Smith ("Smith"), and Jeffrey Van Note ("Van Note"). (Complaint ¶¶ 14-19.) These individuals are sometimes referred to as the "Plan trustees" or "trustees" by the Plan documents.

B. <u>The Bert Bell/Pete Rozelle NFL Player Retirement Plan</u>

Named after two former NFL commissioners,[4] the Plan is a multi-employer retirement plan that provides various pension, disability and other benefits to eligible

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[4] *See*, Pro Football Hall of Fame, "Bert Bell," *available at* https://www.profootballhof.com/players/bert-bell/; Pro Football Hall of Fame, "Pete Rozelle," *available at* https://www.profootballhof.com/players/pete-rozelle/.

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professional football players. (Complaint ¶ 21.) Unlike a single-employer retirement plan—which is funded and administered by one employer and governed by 29 U.S.C. § 1002(16)(B)—multi-employer plans are maintained pursuant to collective bargaining agreements between employers and employee organizations, which require multiple employers (here, the various NFL clubs) to "pool contributions into a single fund that pays benefits to covered retirees who spent a certain amount of time working for one or more of the contributing employers." *Trustees of Local 138 Pension Trust Fund v. F.W. Honerkamp Co. Inc.*, 692 F.3d 127, 129 (2d Cir. 2012); *see also* 29 U.S.C. § 1002(37)(A). This form of multi-employer plan "differ[s] from the typical employer sponsored and administered plan in that [it was] established through collective bargaining between the employees and employers." *Courson v. Bert Bell NFL Player Retirement Plan*, 75 F. Supp. 2d 424, 431 (W.D. Pa. 1999) (interpreting NFL's retirement plan structure). Multi-employer plans are often used in industries where employees frequently transfer among employers. *Id*.; *see also New York Times Company v. Newspaper and Mail Deliverers'-Publishers' Pension Fund*, 303 F. Supp. 3d 236, 241 (S.D.N.Y. 2018) (describing purpose of multi-employer plans). Multi-employer plans are overseen by a board of trustees with equal voting strength held by representatives of the labor union and the employers who contribute to the plan. *See, e.g.*, *Flynn v. Hach*, 138 F. Supp. 2d 334, 337 (E.D.N.Y. 2001) (noting that multi-employer plans have equal representation from labor and management).

Here, the Plan is the result of a collective bargaining agreement between the Council (representing the employers, namely the 32 contributing NFL member clubs), and the Association (representing the NFL players). (Complaint ¶¶ 11, 12; *see also* Plan at

1.) Hudson alleges, and Defendants agree, that the Plan is an employee pension benefit plan within the meaning of ERISA, 29 U.S.C. § 1002(2)(A).[5] As noted above, the Plan is governed by a seven-member Retirement Board. The Council appoints three of the members; the Association appoints three members; and the Commissioner of the NFL serves as an *ex officio* seventh member. (Complaint ¶ 13; Plan at 30, Article 8.1.)

In addition to the Plan itself, this action also implicates the language of the Summary Plan Description, dated August 2010. (Junk Decl., Ex. B.) Generally, ERISA requires that plan administrators provide "summary plan descriptions" to plan participants, which give basic information about when an employee can begin to participate in the plan and how to file a claim for benefits. If a plan is changed, participants must be informed, either through a revised summary plan description, or in a separate document, called a summary of material modifications.[6] *See* 29 U.S.C. § 1022(a) (requiring that summary plan descriptions "be written in a manner calculated to be understood by the average plan participant" and to "be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.") As the summary plan description provided to Hudson says, its goal is to "summarize . . . the Retirement Plan in everyday language." (Junk Decl., Ex. B at 1.)

The Plan provides different benefit levels with differing compensation rates depending on whether the player is disabled, and if so, whether the disability was the

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[5] The Complaint acknowledges that there is a separate NFL Player Supplemental Disability & Neurocognitive Benefit Plan, which only applies to benefits arising after April 1, 2017. That supplemental plan thus does not cover Plaintiff's claimed disability benefits. (Complaint ¶ 21.)

[6] *See generally*, "Health Plans & Benefits: Plan Information," Department of Labor, available at https://www.dol.gov/general/topic/health-plans/planinformation.

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result of playing football. (Complaint ¶ 2; Plan at 18, Article 5.1.) Article 5.1 provides four categories of benefits with different monthly benefit rates depending on which of the benefit criteria are met. (Complaint ¶ 25; Plan at 18, Article 5.1.) Collectively, these categories are known as Total and Permanent Disability ("T&P") benefits.

Two of those T&P benefit categories are relevant to Hudson's lawsuit: (i) "Inactive" T&P benefits, which are available for benefit-eligible retired players whose disability arises from non-NFL-football activities or arises out of NFL football activities more than 15 years after the player's last credited season (Complaint ¶ 23; Plan at 18-19, Article 5.1); and (ii) "Football Degenerative" T&P benefits, which are available for benefit-eligible retired players whose disability arises out of NFL-football activities and results in total and permanent disability within 15 years of the player's last credited season. (Complaint ¶ 25; Plan at 18, Article 5.1.)

As of 2016, "Inactive" T&P benefits provided monthly payments of $4,166.50 a month. "Football Degenerative" T&P benefits provided monthly payments of $10,250.00. (Complaint ¶ 25.) The Plan allows for players to seek benefits for one benefit level and then later apply to be "reclassified" at a different benefit level. To achieve that reclassification, the player must show "clear and convincing" evidence that because of "changed circumstances," the player satisfies the conditions of eligibility for a new classification. (Complaint ¶¶ 28, 30.)

In reviewing a player's claim for additional benefits, an initial determination is made by an Initial Claims Committee, which reviews the facts and circumstances of the request. (Complaint ¶¶ 28, 36.) That group consists of three members: one appointed by the Council, one appointed by the Association, and one medical professional jointly

designated by the Council and Association. (Plan at 30, Article 8.2(b) and 8.4.) Decisions of the Initial Claims Committee are appealable to the Retirement Board, which has the power under the Plan to make the final administrative determination about a player's benefit category. (*Id*.)

C. Hudson's Claims for Disability Benefits

In 2005, about two years after retiring from the NFL, Hudson began complaining of headaches, dizziness, ringing ears, and blurred vision. (Complaint ¶ 31.) These problems worsened in 2008, when he reported "increased anxiety, poor decision making, inability to sit still for long periods of time, sleep problems, decreased ability to concentrate, social withdrawal, memory problems (forgetting the names of familiar people), increased occurrence of headaches, and sensitivity to lights." (*Id*.)

Hudson filed an initial application for disability under the Plan on March 9, 2010. After his claim was denied, Hudson filed an appeal with Retirement Board on July 27, 2010. After subsequent neurological testing, the Retirement Board awarded him T&P "Inactive" disability benefits under the Plan on May 20, 2011. (*Id.* ¶ 32.) However, in that same decision, the Retirement Board determined that Hudson was ineligible for the higher "Football Degenerative" benefits because his cognitive impairments were attributable to non-League related mood disorder. (*Id.* ¶ 33.) In subsequent communications with Hudson on November 28, 2011, the Retirement Board explained that it had determined that his injuries were "not related to League football activities." (*Id.*)

After the May 20, 2011 award of T&P "Inactive" benefits, Hudson filed for Social Security disability benefits on June 27, 2012. On May 5, 2014, the Social Security Administration found that Hudson was disabled as of December 31, 2009. (*Id.* ¶ 34.)

Following that decision, Hudson sought to have his T&P "Inactive" benefits reclassified as "Football Degenerative" benefits by filing a claim under the Plan on September 16, 2014. (*Id.* ¶ 35.) He was again denied by the Initial Claims Committee, which Hudson alleges did not explain how they weighed the evidence of his "changed circumstances" based on the Social Security determination. (*Id.* ¶ 36; Quitt Decl., Ex. A.) In its denial, the Initial Claims Committee notified Hudson of his right to appeal as well as his ability to "submit written comments, documents and any other information that you believe shows you qualify for these benefits." (*Id*.)

Hudson appealed the Initial Claims Committee's decision and included additional pieces of medical evidence to support his claim. (Complaint ¶ 37.) On May 21, 2015, the Retirement Board issued a Final Decision, received by Hudson on May 27, 2015. (Complaint ¶ 38; Quitt Decl., Ex. B.) In its decision, the Retirement Board denied his appeal for reclassification, finding that Hudson failed to meet its "changed circumstances" requirement: "At its May 14, 2015 meeting, the Retirement Board reviewed the entire record underlying your appeal and determined that your request for reclassification must be denied. Section 5.55(b) [of the Plan] governs requests for reclassification such as yours, and it permits reclassification of T&P benefits only where a Player provides 'clear and convincing' evidence of 'changed circumstances' warranting 'a different category of total and permanent disability benefits.' In this and all other instances, the Retirement Board interpret Section 5.5(b)'s 'changed circumstances' requirement to mean a change in Player's physical condition—such as a new or different impairment—that warrants a different category of benefits." (*Id*.)

Hudson alleges that the Retirement Board's denial contained, for the first time, a written explanation of its definition of "changed circumstances" and the standard by which his benefit reclassification request would be evaluated. (Complaint ¶ 39.)

D. Hudson's Requests for Information

Following the Retirement Board's May 27, 2015 denial of his request for higher benefits, Hudson made various legal filings, information requests, and document requests to evaluate and challenge the outcome of the decision. Because the Retirement Board's alleged obligation to share information is relevant to the instant motions, the Court briefly reviews these efforts.

To begin, Hudson filed a lawsuit in the Northern District of Mississippi in August 2015.[7] That lawsuit was dismissed through a stipulation between Hudson and Defendants to remand the issue for further consideration at the administrative level by the Retirement Board.[8] (*Id*. ¶ 40.)

On April 1, 2016, Hudson's counsel sent the Plan Director, Michael Miller, and counsel for the Plan, Michael Junk, a Request for Clarification/Request for Information regarding the Plan's definition of "changed circumstance" and the Retirement Board's definition of "impairment." (*Id*. ¶ 41.) Junk responded in writing noting that two prior court decisions had upheld the Retirement Board's definition of "changed circumstanced" and

[7] That lawsuit was captioned as *Hudson v. Retirement Board*, No. 3:15-cv-128 (N.D. Miss.).

[8] The Retirement Board argues—and Hudson does not dispute—that there were two reasons that Hudson agreed to the remand: First, a federal district court in Maryland had recently endorsed the Retirement Board's interpretation of the Plan; and second, the remand gave Hudson "another chance to show that he met the 'changed circumstances' requirement." (Board Mem. at 5.)

further noted that he would not provide a definition of the term “impairment” because doing so could be construed as an advisory opinion. (*Id.*)

Hudson sent several additional requests for documents and information to Miller and Junk. On June 13, 2016, he again requested a list of all instances where the Retirement Board has interpreted the “changed circumstances” requirement under Article 5.5(b) of the Plan as well as how Retirement Board defines the term “impairment.” (*Id.* ¶ 42) Neither Miller nor Junk responded to the second request. (*Id.*) Hudson then sent a third request on September 30, 2016 seeking further information regarding the Retirement Board’s “use of discretion” in this case as well as various materials. No response or materials were provided. (*Id.* ¶ 43.) On December 12, 2016, Hudson sent another request, which noted that he had not received a response. In a letter dated December 19, 2016, Junk refused to provide any materials on the grounds that they were not relevant. (*Id.* ¶ 45.) Hudson served another series of document requests on December 29, 2016, citing 29 C.F.R. 2560.503-1(m)(8) for a definition of “relevant documents.” Junk responded with a letter dated January 10, 2017, maintaining that “[t]he Retirement Board’s decision . . . is final, it will not be reopened, and the Plan will not produce any of the documents you have requested.” (*Id.* ¶ 46.)

In February 2018, Hudson received notice of a summary of material modifications to the NFL Player Disability & Neurocognitive Benefit Plan (the “2017 Amendment”). (*Id.* ¶ 47.) One modification addressed “[t]he standard for reclassifying [participants’] total and permanent disability benefits”; Hudson alleges that this change modified the standard of what constitutes “changed circumstances” under that Plan. (*Id.* ¶ 47-48.) After receiving that notice, Hudson’s counsel sent a letter dated March 2, 2018 to the Retirement Board

asking whether these changes "were meant to apply retroactively to persons such as Mr. Hudson." By a separate letter on March 2, 2018, Hudson's counsel also made a request pursuant to 29 U.S.C. § 1024(b)(4) requesting certain documents. (*Id.* ¶ 48.) On March 13, 2018, the Retirement Board sent Hudson's counsel the NFL Player Disability & Neurocognitive Benefit Plan (Amended and Restated as of April 1, 2017), a Summary of Material Modifications (undated), and a Summary Plan Description (dated September 2015). (*Id.* ¶ 49.) However, the Retirement Board did not respond to Hudson's question about whether the Board intended to have the 2017 Amendment to the Plan apply to Hudson's claim for benefits. (*Id.* ¶ 51.) On March 15, 2018, the Retirement Board's counsel sent an email to Hudson's counsel, stating: "We will not ask the Retirement Board for what amounts to an advisory opinion on questions that, frankly, we do not even understand." (*Id.*)

E. <u>Hudson's Requests for Relief</u>

The Complaint seeks several forms of legal and equitable relief under ERISA, which the Court summarizes here. (*See* Complaint at 33-35, ¶¶ A-L.)

First, the Complaint asks the Court to declare that all Defendants violated their respective fiduciary duties under 29 U.S.C. § 1104(a)

Second, it asks the Court to declare that the Retirement Board violated 29 U.S.C. § 1104(a)(1)(A)-(B) and (D), in failing to make sufficient disclosures to participants about their benefits, and that it failed to communicate sufficient information about the standard to obtain reclassification under the Plan.

Third, it asks that the Court direct the Retirement Board to "disclose the standards for reclassification in the [Summary Plan Description] and in other disclosures in language

understood by the average participant in this Plan, that such disclosures will not use legal jargon or legal terms and that the disclosures must use clarifying examples to explain the meaning of ‘clear and convincing evidence’ or ‘changed circumstances’ to Plan participants in those documents.”

Fourth, it asks for a judicial declaration voiding all denials of reclassifications by any member of the putative class based on either lack of “clear and convincing evidence” or lack of “changed circumstances” under the Retirement Board’s prior interpretation.

Fifth, it asks for an Order either “(1) reforming the reclassification process and determining that the terms ‘clear and convincing evidence’ and ‘changed circumstances’ must be interpreted according to the ordinary meaning of those terms as understood by the average participant in this Plan or (2) determine that the initial classification is voidable at the option of each member of the putative class and require that Defendants allow Plaintiff and each member to make a claim for benefits as their initial classification, whichever is in the best interests of the class.”

Sixth, it asks for an Order that, to the extent that any of the members of the putative class successfully obtain reclassification or increased benefits following the entry of this Court’s Order, that Defendants must be charged pre-judgment interest from the date of Plaintiff’s initial request for reclassification.

Seventh, it asks the Court to impose a surcharge against the Defendants for attorneys’ fees or expenses incurred by Hudson (or other putative class members) who incurred such fees and expenses in connection with the request for reclassification, which the Retirement Board denied using an allegedly undisclosed interpretation of the phrase “changed circumstances.”

Eighth, the Complaint seeks a declaration that the 2017 Amendment, including any revised standards for reclassification of benefit categories, do not apply to Hudson or members of the putative class.

Ninth, the Complaint seeks a declaration that Section 11.7(b) violates 29 U.S.C. § 1110, and is null and void to the extent that it conflicts with 29 U.S.C. § 1113, and asks the Court to "reform" the Plan accordingly.

Tenth, the Complaint asks the Court to remove any of the "breaching fiduciaries" from their positions on the Retirement Board and to enjoin them from acting as fiduciaries for any plan that covers any members of the putative class and, if necessary, to appoint an independent fiduciary to "act as the Retirement Board" at the expense of the Defendants.

Eleventh, the Complaint asks the Court to require Defendants to pay attorney's fees and the costs of this action pursuant to 29 U.S.C. § 1132(g)(1), or order that Defendants pay reasonable fees and expenses of this action to Plaintiffs' counsel "on the basis of the common benefit and/or common fund doctrine (and/or other applicable law) out of any money or benefit recovered" for the members of the class.

Twelfth, and finally, the Complaint seeks "any such other relief that the Court determines that he and the putative class members are entitled pursuant to 29 U.S.C. § 1132(a) and pursuant to Rule 54(c) of the Federal Rules of Civil Procedure or otherwise."

Legal Standards

A. Standards for Motion to Dismiss

All Defendants seek dismissal based upon Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion, a

complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the factual content pleaded allows a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id*. (quoting *Twombly*, 550 U.S. at 557).

In considering a motion to dismiss for failure to state a cause of action, a district court "accept[s] all factual claims in the complaint as true and draw[s] all reasonable inferences in the plaintiff's favor." *Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395, 403 (2d Cir. 2014) (internal quotations omitted). This tenet, however, is "inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. "Rather, the complaint's factual allegations must be enough to raise a right to relief above the speculative level . . . *i.e.*, enough to make the claim plausible." *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (internal quotation marks omitted). A complaint is properly dismissed where, as a matter of law, "the allegations in [the] complaint, however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558.

When considering a motion to dismiss pursuant to Rule 12(b)(6), a court generally is confined to the facts alleged in the complaint. *Cortec Industries v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991). A court may, however, consider additional materials, including documents attached to the complaint, documents incorporated into the complaint by reference, public records, and documents that the plaintiff either possessed

or knew about, and relied upon, in bringing the suit. *See Kleinman v. Elan Corp.*, 706 F.3d 145, 152 (2d Cir. 2013) (quoting *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007)); *see also*, *Yak v. Bank Brussels Lambert,* 252 F.3d 127, 130 (2d Cir. 2001) (explaining that on Rule 12(b)(6) motion to dismiss, court may consider any documents of which the parties had actual notice, and which are integral to the complaint). In that regard, if "a document relied on in the complaint contradicts allegations in the complaint, the document, not the allegations, control, and the court need not accept the allegations in the complaint as true." *Poindexter v. EMI Record Group Inc.*, No. 11 Civ. 559, 2012 WL 1027639, at *2 (S.D.N.Y. March 27, 2012) (citing *Barnum v. Millbrook Care Ltd. Partnership*, 850 F. Supp. 1227, 1232-33 (S.D.N.Y.1994)).

In the context of ERISA actions, courts will consider the underlying retirement plan documents in connection with a motion to dismiss. *See McCarthy v. Dun & Bradstreet Corporation,* 482 F.3d 184, 191 (2d Cir. 2007) (considering ERISA plan documents on motion to dismiss); *In re Bank of America Corp. Securities, Derivative, and Employee Retirement Income Security Act Litigation,* 756 F. Supp. 2d 330, 345 (S.D.N.Y. Aug. 27, 2010) (same).

B. ERISA Standards

Hudson's lawsuit is premised on the scope of the fiduciary duties held by the respective Defendants under ERISA. It is undisputed that the Plan is a multi-employer pension plan subject to 29 U.S.C. §§ 1001-1461. (Complaint ¶ 1; Council Mem. at 2; Association Mem. at 4; Board Mem. at 3.)

ERISA was enacted "to provide a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila,* 542 U.S. 200, 208 (2004). It is designed to protect

employee benefit and pension plans by, among other things, "setting forth certain general fiduciary duties applicable to the management of both pension and non-pension benefit plans." *Varity Corp. v. Howe,* 516 U.S. 489, 496 (1996); *see also Trustees of the Local 138 Pension Trust Fund*, 692 F.3d at 128 ("ERISA is a comprehensive statutory scheme regulating employee retirement plans."). Several legal standards within ERISA are implicated by the Complaint.

1. Fiduciary Status Under ERISA

ERISA "places great responsibilities upon the fiduciaries of a plan to protect the interests of the plan's beneficiaries." *Gerosa v. Savasta & Co.*, 329 F.3d 317, 320 (2d Cir. 2003) (citing 29 U.S.C. §§ 1101–1112 and describing responsibilities of ERISA fiduciaries). Only those who are deemed fiduciaries are subject to ERISA liability. *See Adler v. Aztech Chas. P. Young Co.*, No. 91 Civ. 5042, 1992 WL 309548, at *4 (S.D.N.Y. Oct. 15, 1992) ("ERISA imposes liability only upon fiduciaries—those who exercise discretion over the administration or management of a plan"); *Majad ex rel. Nokia Retirement Savings & Investment Plan v. Nokia, Inc.*, 528 F. App'x 52, 57 (2d Cir. 2013), as amended (June 25, 2013) (rejecting plaintiffs' claims for failure to monitor retirement plan where there was no underlying ERISA fiduciary duty). "The 'threshold question' in 'every case charging breach of ERISA fiduciary duty' is whether the defendant 'was acting as a fiduciary . . . when taking the action subject to complaint.'" *Fisher v. JP Morgan Chase & Co.*, 703 F. Supp. 2d 374, 381–82 (S.D.N.Y. 2010), *aff'd*, 469 F. App'x 57 (2d Cir. 2012) (quoting *Pegram v. Herdrich,* 530 U.S. 211, 226 (2000)).

ERISA defines a fiduciary functionally, providing in relevant part:

> "[A] person is a fiduciary with respect to a [retirement] plan to the extent (i) he exercises any discretionary authority or discretionary control respecting

> management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."

29 U.S.C. § 1002(21)(A); *see also Bouboulis v. Transportation Workers Union of America,* 442 F.3d 55, 63 (2d Cir. 2006); *In re Worldcom, Inc.,* 263 F. Supp. 2d 745, 757 (S.D.N.Y. 2003) ("*Worldcom*") ("ERISA defines a fiduciary in functional terms of control and authority over the plan.") (internal quotations omitted); *Cress v. Wilson*, No. 06 Civ. 2717, 2008 WL 5397580, at *3 (S.D.N.Y. Dec. 29, 2008) (same). In other words, fiduciaries under ERISA are those who exercise fiduciary functions over the retirement plan. *In re American Express Company ERISA Litigation*, 762 F. Supp. 2d 614, 624 (S.D.N.Y. 2010).

ERISA allows for "both named and *de facto* fiduciaries." *In re Bear Stearns*, 763 F. Supp. 2d at 565. A named fiduciary is a fiduciary identified in the plan document "that possess[es] the 'authority to control and manage the operation and administration of the Plan.'" *Id*. (quoting 29 U.S.C. § 1102(a)(1)). By contrast, a *de facto* fiduciary is "a fiduciary to the extent that [it] 'exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,' or 'has any discretionary authority or discretionary responsibility in the administration of such plan.'" *Id*. (quoting ERISA 29 U.S.C. § 1002(21)(A)); *see also*, *In re Kakareko*, 575 B.R. 12, 23 (Bankr. E.D.N.Y. 2017) ("The definition of 'fiduciary' under ERISA focuses on the exercise, as well as the possession, of authority or control.") (internal citations omitted).

The question of whether any particular defendant in an ERISA action has fiduciary status "can be determined as a matter of law at the motion to dismiss stage." *In re Bear Stearns Companies, Inc. Securities, Derivative, and ERISA Litigation* ("*In re Bear Stearns*"), 763 F. Supp. 2d 423, 565 (S.D.N.Y. 2011).

Not all actions that a party takes with respect to a retirement plan render that party a fiduciary under ERISA. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 444 (1999) (finding that employer's fiduciary duties include administering plan assets but do not extend to decisions concerning "the composition or design of the plan itself"); *Lockheed Corp. v. Spink,* 517 U.S. 882, 890 (1996) (explaining that when plan sponsors act to adopt, modify, or terminate an ERISA plan, they act as "settlors of a trust" and do not fall into the category of ERISA fiduciaries); *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987) ("a person may be an ERISA fiduciary with respect to certain matters but not others . . . ."). Where a party "has no authority to [act with respect to a certain act or action], it cannot be held liable for failing to take that action." *In re Bear Stearns*, 763 F. Supp. 2d at 566.

In the context of multi-employer retirement plans, unions and management generally are themselves not considered to be fiduciaries of the negotiated ERISA plan. Rather, the plan itself has trustees, appointed by the negotiating parties, who function as the independent fiduciaries. Indeed, the Labor Management Relations Act ("LMRA") has been interpreted to prohibit an employer organization or an employee organization from directing or supervising the determinations made by trustees they appoint. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("*Amax*") (interpreting 29 U.S.C. § 186 to mean that an employer who appoints a representative to the board of trustees of a retirement

plan thus “may [not] direct or supervise the decisions of a trustee he has appointed.”). Addressing this provision of the LMRA, the Supreme Court explained the importance of preventing a trustee from “dividing his loyalties,” such as between labor and management, to “prevent any possibly injury to the beneficiary.”[9] *Id.*

2. ERISA Fiduciary Liability

To state a claim for fiduciary breach under ERISA, a plaintiff must allege facts showing that the defendant was a fiduciary of the retirement plan, that the defendant breached its fiduciary duty, and that the breach caused a loss. *See Pension Benefit Guaranty Corp. ex rel. St. Vincent Catholic Medical Centers Retirement Plan v. Morgan Stanley Investment Management, Inc.*, 712 F.3d 705, 730 (2d Cir. 2013) (“To state a claim for breach of fiduciary duty under ERISA, a plaintiff must allege facts which, if true, would show that the defendant acted as a fiduciary, breached its fiduciary duty, and thereby caused a loss to the plan at issue”); *see also Trustees of Upstate New York Engineers Pension Fund v. Ivy Asset Management*, 131 F. Supp. 3d 103, 121 (S.D.N.Y. 2015) (same); *Severstal Wheeling Inc. v. WPN Corp.*, 809 F. Supp. 2d 245, 254 (S.D.N.Y. 2011), aff'd sub nom. *Severstal Wheeling, Inc. v. WHX Corp.*, 659 F. App’x 28 (2d Cir. 2016) (same).

Regardless of whether the fiduciary is named or *de facto*, an action for a breach of ERISA fiduciary duty requires that the defendant “was acting as a fiduciary (that is, was

[9] The central issue in *Amax* was whether the employer-appointed trustee of a benefits trust fund was a management representative within the meaning of the LMRA. The Court held that such a trustee was not a management representative, and instead owed his complete fiduciary loyalty to the trust and its beneficiaries. The Court determined that Congress intended, through the LMRA and ERISA, that the actions of trustees of union/management multi-employer trust funds should be governed by the principles of trusts. *Amax*, 453 U.S. at 330-331.

performing a fiduciary function) when taking the action subject to complaint." *Fisher*, 703 F.Supp.2d at 374 (internal quotations omitted) (quoting *Pegram v. Herdrich,* 530 U.S. 211, 226 (2000)).

As for breach, ERISA holds fiduciaries to the "prudent [person]" standard. *Worldcom,* 263 F. Supp. 2d at 758. As the ERISA statute provides:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . .

29 U.S.C. § 1104(a)(1).

ERISA thus imposes three "overlapping standards": to act "solely in the interests of the participants and beneficiaries," to act "for the exclusive purpose" of providing benefits to them, and to act with the care of a reasonably "prudent [person]." *Donovan v. Bierwirth,* 680 F.2d 263, 271 (2d Cir.1982); *Cress*, 2008 WL 5397580, at *3 (same). These duties, which are drawn from the common law of trusts, have been described as "the highest known to the law." *Worldcom,* 263 F. Supp. 2d at 758 (quoting *Flanigan v. Gen. Elec. Co.,* 242 F.3d 78, 86 (2d Cir. 2001)). ERISA fiduciaries must manage the plan with "an eye single" to the interests of the plan's participants and beneficiaries. *Worldcom,* 263 F. Supp. 2d at 758 (quoting *Donovan,* 680 F.2d at 271).

ERISA imposes liability on a plan fiduciary who "breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries . . . ." 29 U.S.C. § 1109(a). A breaching fiduciary is "personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." *Id.*

3. Duty to Disclose Plan Information Under ERISA

The duty of care and loyalty found in 29 U.S.C. § 1104(a)(1)(B) has been applied to fiduciaries' communications with plan beneficiaries. *See, e.g., Bilello v. JPMorgan Chase Retirement Plan,* 649 F. Supp. 2d 142, 165–66 (S.D.N.Y.2009) ("Communicating information about the contents of a plan is a discretionary responsibility giving rise to a fiduciary obligation.") (citing *Bouboulis v. Transport Workers Union of America,* 442 F.3d 55, 65 (2d Cir.2006)). Consequently, "[f]iduciaries may be held liable for statements pertaining to future benefits if the fiduciary knows those statements are false or lack a reasonable basis." *Bilello,* 649 F.Supp.2d at 166 (quoting *Flanigan*, 242 F.3d at 84); *see also Varity Corp.,* 516 U.S. at 506; *Ballone v. Eastman Kodak Co.,* 109 F.3d 117, 122 (2d Cir.1997). Moreover, fiduciaries may be "liable for non-disclosure of information about a current plan when the omitted information was necessary to an employee's intelligent decision about retirement." *Flanigan,* 242 F.3d at 84 (citing *Becker v. Eastman Kodak Co.,* 120 F.3d 5 (2d Cir.1997)); *see also Devlin v. Empire Blue Cross and Blue Shield,* 274 F.3d 76, 88 (2d Cir.2001) ("[W]hen a plan administrator . . . fails to provide information when it knows that its failure to do so might cause harm, the plan administrator

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has breached its fiduciary duty to individual plan participants and beneficiaries") (internal citations omitted); *Miller v. International Paper Co.*, No. 12 Civ. 7071, 2013 WL 3833038, at *4 (S.D.N.Y. July 24, 2013) (same).

While ERISA fiduciaries have a duty to disclose "changes in the terms of a benefit plan and complete and accurate information about the administration of the plan," at the same time, "it is inappropriate to infer an unlimited disclosure obligation." *In re Bear Stearns*, 763 F. Supp. 2d at 576-77. For example, courts in this Circuit have rejected breach of fiduciary duty claims seeking disclosure of certain valuation reports, internal board deliberations, and financial information regarding plan investments. *See, e.g.*, *Gearren v. The McGraw–Hill Companies, Inc.,* 660 F.3d 605, 610 (2d Cir. 2011) (no duty to disclose "expected performance of the employer's stock"); *In re Citigroup ERISA Litigation,* 662 F.3d 128, 142 (2d Cir. 2011), abrogated on other grounds by *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014) (no duty to provide plan participants with "non-public [information and documents] that could pertain to the expected performance of Plan investment options"); *Board of Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein,* 107 F.3d 139, 146–47 (2d Cir. 1997) (no duty to disclose "actuarial valuation reports"); *In re Express Scripts/Anthem ERISA Litigation*, 285 F. Supp. 3d 655, 676 (S.D.N.Y. 2018) (no duty to disclose internal "contractual arrangements").

4. <u>Duty to Monitor Under ERISA</u>

As explained above, in a multi-employer retirement plan, an independent board of trustees is appointed by labor and management; those trustees are responsible for the administration and management of the plan. 29 U.S.C. § 1002(37)(A); *see also Trustees*

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of Local 138 Pension Trust Fund, 692 F.3d at 129 (describing purposes of multiemployer plans); *Courson*, 75 F. Supp. 2d at 430-31 (same).

Within the duty to appoint and remove trustees of a multi-employer plan, courts have also found a duty to monitor the conduct of those trustees. While the Second Circuit has not directly addressed the scope of this duty in the multi-employer context, district courts within the Circuit have done so.[10] *See*, *e.g., Liss v. Smith*, 991 F. Supp. 278, 311 (S.D.N.Y. 1998) ("The power to appoint and remove trustees carries with it the concomitant duty to monitor those trustees' performance"); *Bennett v. Manufacturers & Traders*, No. 5:99–cv–827, 2005 WL 2896962, at * 7 (N.D.N.Y. Nov. 2, 2005) (finding that an individual "invested with the duty to appoint the trustees who managed the Plans[ ] . . . ha[s] the concomitant duty to monitor those trustees."). This duty to monitor, however, is limited "to ensur[ing] that the appointees are performing their fiduciary obligations." *Liss*, 991 F. Supp. at 311; *see also Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1459-60 (5th Cir. 1986) ("[A] person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control. For example, if an employer and its board of directors have no power with respect to the plan other than to appoint the plan administrator and the trustees, then their fiduciary duty extends only to those functions") (internal citations omitted); *International Brotherhood of Electrical Workers, Local 90 v. National Electrical Contractors Association*, No. 3:06-cv-2, 2008 WL 918481, at *6-7 (D. Conn. March 31, 2008) (multi-employer) (finding that employer association representing contributing employers was an

[10] The parties have not cited any decision of a Court of Appeals outside the Second Circuit addressing the scope of the duty to monitor in multi-employer plans, and the Court is not aware of any.

ERISA fiduciary by virtue of its power to appoint and remove trustees, but noting that the employer association's "fiduciary obligations are, of course, limited to those aspects of the plan over which [it] exercises authority or control," namely the appointments process).

The duty of appointing entities to monitor their appointed trustees thus extends only to whether those trustees are executing their functions, not to the substance of their decisions. For instance, in *International Brotherhood of Electrical Workers,* the court found a multi-employer organization liable for breach of fiduciary duty where trustees frequently failed to attend meetings and cast votes; the one trustee who did attend and vote was ineligible to do so; and the appointing organization failed to conduct any assessment of trustee performance. 2008 WL 918481, at *3, 8.

Courts follow the same principle when evaluating duty to monitor claims in single-employer plans, generally rejecting the proposition that parties with the authority to appoint trustees become *de facto* fiduciaries themselves with respect to the decisions made by the trustees. *See, e.g.*, *In re Morgan Stanley ERISA Litigation*, 696 F. Supp. 2d 345, 356 (S.D.N.Y. 2009) (the mere "right to appoint and remove fiduciaries is insufficient to constitute fiduciary status"); *In re Polaroid ERISA Litigation*, 362 F. Supp. 2d 461, 473 (S.D.N.Y. 2005) ("ERISA does not attach liability for investment decisions to fiduciaries whose roles were limited to appointing, retaining and removing other fiduciaries"); *In re WorldCom, Inc.*, 263 F. Supp. at 760; *see also* 29 C.F.R. § 2509.75-8 at D-2 (explaining that "persons who have no power to make any decisions as to plan policy, interpretations, practices or procedures" are not plan fiduciaries because "[o]nly persons who perform one or more of the functions described in [29 U.S.C. § 1002] with respect to an employee benefit plan are fiduciaries").

For example, in *In re WorldCom, Inc*., the court rejected the plaintiffs' assertion that "the right to appoint and to remove the individuals who will [serve as a plan administrator] is a fiduciary function [conferring] the fiduciary duty to monitor the performance of an appointee." 263 F. Supp. 2d at 760. The court specifically noted that the plaintiffs' argument "goes too far," because "[i]t would make any supervisor of an ERISA fiduciary also an ERISA fiduciary." *Id*.

This argument is even more persuasive in the context of multi-employer plans. Imposing a generalized fiduciary obligation on appointing parties over all actions by trustees would be inconsistent with the LMRA's prohibition against employer and employee organizations directing or supervising the independent determinations made by trustees they appoint. *See* 29 U.S.C. § 186; *Amax*, 453 at 329-30 (applying LMRA to multi-employer plan); *see also Rothstein v. American International Group, Inc.*, 837 F.3d 195, 209 (2d Cir. 2016) (noting that employer lacks "authority to direct management or policy decisions [of its appointed trustees to the retirement board]. Again, if the Board had discretion to favor [the appointing employer] in its management of the Plans, [the employer] might be able to compel favorable treatment by threatening to disband the Plans if the Board did not cooperate. But ERISA's imposition of strict fiduciary duties blocks such corporate influence").

Put differently, an appointing party does not have the unlimited fiduciary duty to monitor, supervise and evaluate the decisions of the trustees, nor does that party have liability for the decisions made by the trustees. Rather, an appointing party has a limited fiduciary duty to ensure that trustees are appointed and removed pursuant to the terms of the plan and carry out their fiduciary functions. Were it otherwise, the appointing

employer or employee organization would violate the LMRA's prohibition against their supervising or directing the decisions of trustees. *See* 29 U.S.C. § 186; *Amax*, 453 U.S. at 329.

5. Equitable Relief for Remediation of Plan Violation

ERISA allows a "participant, beneficiary, or fiduciary" to bring a civil action seeking "(A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of [a] [benefit] plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of [a] plan." 29 U.S.C. § 1132(a)(3). Plaintiffs invoke this provision, for example, in disputes alleging that a fiduciary has failed to provide accurate notices or complete information to beneficiaries or has failed to provide notices that are required by statute. *See, e.g.*, *Varity Corp.,* 516 U.S. at 506-07, 515; *Weinreb v. Hospital for Joint Diseases Orthopedic Institute,* 404 F.3d 167, 171 n. 1 (2d Cir. 2005).

To obtain equitable relief under 29 U.S.C. § 1132(a)(3), a plaintiff must make the required showing for "the particular equitable remedies he seeks." *Osberg v. Foot Locker, Inc.,* 907 F. Supp. 2d 527, 533 (S.D.N.Y. 2012) ("*Osberg II*") (citing *CIGNA Corp. v. Amara,* 563 U.S. 421, 443). And although the statute provides a vehicle for seeking equitable relief, a plaintiff must allege an underlying violation of some substantive provision of ERISA. *See, e.g., Gates v. United Health Group,* No. 11 Civ. 3487, 2012 WL 2953050, at *11 (S.D.N.Y. July 16, 2012) (plaintiff's ability to seek equitable relief pursuant to 29 U.S.C. § 1132(a)(3) "does not relieve her from having to establish an underlying violation of the statute"); *Demopoulos v. Anchor Tank Lines, LLC*, 117 F. Supp. 3d 499,

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512 (S.D.N.Y. 2015) (same); *Miller v. International Paper Co.*, No. 12 Civ. 7071, 2013 WL 3833038, at *3-4 (S.D.N.Y. July 24, 2013) (same).

6. Time Limitations on ERISA Claims

The applicable statute of limitations under ERISA depends on the specific claim alleged. For claims related to breach of fiduciary duty (Counts II, III, and V of Hudson's Complaint), ERISA imposes the following limitations periods:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of –
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113. In other words, a plaintiff has six years from the date of the last action that was part of the alleged breach of fiduciary duty to file a complaint. 29 U.S.C. § 1113(1). However, if the plaintiff developed actual knowledge of the breach, then they have only three years of the date he learned of the breach. 29 U.S.C. § 1113(2).

Where a defendant engaged in fraud or concealment, the six-year statute of limitations is tolled "until the plaintiff discovers, or should with reasonable diligence have discovered, the breach." *Id.* In this Circuit, "fraud or concealment" is read disjunctively, such that the exception applies in cases of either fraud or concealment. *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 190 (2d Cir. 2001).

To qualify for tolling under the fraud or concealment exception, a complaint must allege that a fiduciary either "(1) breached its duty by making a knowing misrepresentation or omission of a material fact to induce an employee/beneficiary to act to his detriment; or (2) engaged in acts to hinder the discovery of a breach of fiduciary duty." *In re Express Scripts/Anthem ERISA Litigation*, 285 F. Supp. 3d at 674–75 (quoting *Janese v. Fay*, 692 F.3d 221, 227 (2d Cir. 2012)); *see also*, *Caputo,* 267 F.3d at 190 (same). A plaintiff must plead fraudulent allegations "with particularity," specifying the "time, place, speaker, and content of the alleged misrepresentations," explaining "how the misrepresentations were fraudulent," and describing the events giving rise to a "strong inference" that a defendant had an intent to defraud, knowledge of the falsity of the statements, or a reckless disregard for the truth. *Janese*, 692 F. 3d at 228 (quoting *Caputo,* 267 F.3d at 191). To allege concealment, a plaintiff must plead facts giving rise to a duty to disclose the relevant information. *See DePasquale v. DePasquale,* No. 12-CV-2564, 2013 WL 789209, at *12 (E.D.N.Y. March 1, 2013), *aff'd* 568 Fed. App'x. 55 (2d Cir. 2014)).

Beyond claims for breach of fiduciary duty, the Complaint also includes causes of action relating to the summary plan description under 29 U.S.C. § 1022 (Count I), injunctive relief to limit the applicability of the 2017 Amendment under 29 U.S.C. § 1132 (Count IV), and enforcement of the statute's prohibition on exculpatory provisions under 29 U.S.C. § 1110 (part of Count V). For these three claims, the limitations analysis is different. Other than claims for breaches of fiduciary duty, ERISA does not provide limitations periods for suits brought to enforce its provisions. Federal courts thus look to the most closely analogous statute of limitations under state law. *See Osberg v. Foot Locker, Inc.*, 656 F. Supp. 2d 361, 369-70 (S.D.N.Y. 2009) ("*Osberg I*") (noting in case

with a 29 U.S.C. § 1022 claim that "ERISA provides no statute of limitations for civil enforcement actions other than breach of fiduciary duty claims"), *aff'd in part and vacated in part on other grounds*, 555 Fed. App'x. 77 (2d Cir. 2014). Because claims under ERISA present questions of federal law, federal courts look to federal common law to determine when the claim accrued. *Guilbert v. Gardner*, 480 F.3d 140, 148-149 (2d Cir. 2007).

For some time, courts applied New York's six-year breach of contract period to claims relating to summary plan descriptions under 29 U.S.C. § 1022. However, the U.S. Supreme Court and Second Circuit have since clarified that New York's three-year limitations period applies. In *Osberg I*, the court initially determined that a six-year limitations period applies to disclosure claims because "the judicially inferred statute of limitations for ERISA actions in New York State is six years, based on the statute of limitations for contract actions." 656 F. Supp. 2d at 370 (citing *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 55 (2d Cir. 2009)). Two years later, the Supreme Court held that a summary plan description is not a contract. *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011). The *Osberg* court therefore held in a later decision that the appropriate limitations period for disclosure claims is actually three years. *Osberg II*, 907 F. Supp. 2dat 533 ("*Amara* has now clarified that [a summary plan description] is not a contract—its terms are not subject to enforcement," so the most similar New York statute of limitations is not the six-year period governing contract claims but the three-year period governing statutory violations); *Amara*, 563 U.S. at 436.

<u>Discussion</u>

Plaintiff asserts five causes of action. Count I alleges a violation of 29 U.S.C. § 1022(a) against the Retirement Board for inadequate disclosures in the Summary Plan

Description. Count II alleges that the Retirement Board and Individual Board Members breached their fiduciary duty to disclose the terms of the Plan under 29 U.S.C. § 1104(a)(A)-(B). Count III alleges breach of fiduciary under 29 U.S.C. §§ 1104(a)(1)(A), (B) and (D) for "failure to monitor" against both the Council and the Association. Count IV, asserted against all Defendants, seeks to prohibit application of the 2017 Amendment to Hudson and the putative class members pursuant to 29 U.S.C. § 1132(a)(3). Count V, also against all Defendants, asserts a violation of 29 U.S.C. §§ 1110(a) and 1104(a)(1)(A)-(B) for attempting to relieve themselves of their fiduciary obligations through exculpatory provisions of the Plan.

The Court begins by discussing the claims against the Council and the Association (Counts III, IV, and V), and ultimately recommends dismissal because these entities lack the requisite fiduciary duties to establish liability under ERISA. The Court then discusses the claims against the Retirement Board, as well as the Individual Board Members (Counts I, II, IV and V). For those claims, the Court concludes that while the Retirement Board is a Plan fiduciary, there is no legal basis for asserting that it violated its duties by any act or omission. In short, for the reasons that follow, all of Hudson's claims lack merit as a matter of law and should be dismissed.

A. Claims Against the Council Should be Dismissed

The Complaint asserts three claims against the Council, all of which are predicated on Hudson's allegation that the Council is an ERISA fiduciary of the Plan. Count III asserts that the Council breached its fiduciary duty under ERISA by failing to monitor the actions of the members of the Retirement Board that it appointed. Count IV seeks invalidation of the 2017 Amendment, to the extent it applies to the Plan retroactively against Plaintiff.

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Count V asserts that the Plan wrongfully relieves the fiduciaries from responsibility in violation of 29 U.S.C. §§ 1110(a) and 1104(a)(1)(A)-(B). Each of these claims against the Council fail to state a claim upon which relief can be granted and should be dismissed.

1. <u>The Council's ERISA Fiduciary Duties Do Not Extend to Benefit Reclassification Decisions, Precluding Liability</u>

For the Council to have any liability under ERISA, it must be an ERISA fiduciary of the Plan. *In re Bear Stearns*, 763 F. Supp. 2d at 566 (where a party "has no authority to [act], it cannot be held liable for failing to take that action"). The Council is not named in the Plan document as a fiduciary. Instead, the Plan explicitly states that "[t]he Retirement Board will be the 'named fiduciary' of the Plan." (Plan at 30, Article 8.2.) Indeed, Plaintiff does not allege that the Council was a named fiduciary.

The question, then, is whether the Council qualifies as a *de facto* fiduciary. *See In re Bear Stearns Co.*, 763 F. Supp. 2d at 565 (ERISA allows for "both named and *de facto* fiduciaries"). As per the statute, "[a] person is a [*de facto*] fiduciary with respect to a [retirement] plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A); *see also Bouboulis,* 442 F.3d at 63; *Worldcom,* 262 F.Supp.2d at 757 ("ERISA defines a fiduciary in *functional* terms of control and authority over the plan") (internal quotation marks omitted); *Cress*, 2008 WL 5397580, at *3 (same).

The only power exercised by the Council was the appointment of three members of the Retirement Board, as dictated by the Plan. (Plan at 30.) The Complaint fails to allege any facts to establish that the Council either possessed or exercised (or failed to exercise) any broader powers. For example, the Complaint makes no allegations showing that the Council "exercise[d] any discretionary authority or discretionary control respecting management" of the Plan, directed the "disposition of assets" under the Plan, "render[ed] investment advice" related to the Plan, or "ha[d] any discretionary authority or discretionary responsibility" in administration of the Plan. 29 U.S.C. § 1002(21)(A). As the Council correctly argues in its moving brief, the Complaint "barely mentions" the Council "and certainly does not allege that the [Council] was involved in any way in managing or administering the Plan." (Council Mem. at 8.) In his opposition papers, Hudson even concedes that the Council has no discretionary authority over the Plan or the administrative decisions made by the Retirement Board. (*See* Pl. Mem. at 40) ("[N]othing in [the Complaint] suggests that either the Players Association or the Management Council was required to . . . oversee each and every medical review or usurp the authority of the Board.")

Hudson nevertheless argues that the Council is a fiduciary of the Plan with liability for the substantive decisions of the Retirement Board "[b]y virtue of [the Council's] powers to appoint and remove other fiduciaries." (Complaint ¶ 11.) Because the Council has that appointment and removal power, Hudson asserts, the Council has a resulting duty to monitor those appointees, as well as the duty to take "certain actions to remedy the Board Defendants' breaches [of fiduciary duty]"—specifically, to replace Retirement Board members when they reach an allegedly erroneous decision. (Pl. Mem. at 40-41.)

This argument fails. As set forth earlier, the mere ability to appoint or remove trustees to the board of a retirement plan is insufficient to establish broader fiduciary liability for the trustees' substantive decisions. *See, e.g., In re Morgan Stanley ERISA Litigation*, 696 F. Supp. 2d at 356; *In re Polaroid ERISA Litigation*, 362 F. Supp. 2d at 473; *WorldCom.*, 263 F. Supp. at 760. In multi-employer plans, such as the one here, the LMRA prohibits an appointing party from directing or supervising the decisions of the independent board members. *See* 29 U.S.C. § 186; *Amax*, 453 at 329-30 (applying LMRA); *Rothstein*, 837 F.3d at 209 (discussing importance of trustee independence). At most, appointing parties have only a "'limited' fiduciary obligation[ ] . . . to ensure that the appointees are performing their fiduciary" functions such as attending meetings and voting. *Liss*, 991 F. Supp. at 311; *see also Maldonado*, 1990 WL 17635, at *5; *Sommers Drug Stores*, 793 F.2d at 1459-60.

The Council makes a compelling—and common sense—policy argument that underscores the implausibility of Hudson's fiduciary duty claims. (Council Mem. at 9, n.5.) If every employer or union that appoints plan trustees were themselves deemed an ERISA fiduciary liable for every alleged act or omission of those trustees, the whole system of multi-employer pension plans would become grossly inefficient. Appointing entities would have the independent obligation to review the decisions of the trustees for every single purported error and take steps to correct those errors by, *inter alia*, removing trustees with whom they disagree. Such a model of liability, as sought by Hudson here, would be unworkable from a practical perspective, and would undermine the LMRA's bar against appointing entities from supervising or directing the trustees they appoint. *See WorldCom*, 263 F. Supp. 2d at 760 (observing that plaintiffs' argument "goes too far,"

because "[i]t would make any supervisor of an ERISA fiduciary also an ERISA fiduciary."); *Johnson v. Evangelical Lutheran Church in America*, No. 11-CV-23, 2011 WL 2970962, at *5 (D. Minn. July 22, 2011) (analyzing multiemployer plan and finding that the "duty to monitor is limited and does not include a duty to review all business decisions of Plan administrators because that standard would defeat the purpose of having trustees appointed to run a benefits plan in the first place") (internal citations omitted); *Lingis v. Motorola, Inc.*, 649 F. Supp. 2d 861, 881-82 (N.D. Ill. 2009) (finding that the duty to monitor has "clear limits" and that a broad duty to monitor would undermine the rationale of delegating authority to a committee).

In short, there is no support in the Plan itself, or in any of the factual allegations in the Complaint, that the Council has the responsibility to supervise, evaluate, or second-guess the substantive decisions of their selected members of the Retirement Board. The mere fact that the Council can appoint and remove three members of the Retirement Board does not suffice to make the Council liable for the Retirement Board's substantive decisions. Accordingly, the three claims against the Council—all predicated on its purported fiduciary liability—are without merit and should be dismissed.[11]

[11] For Hudson to successfully state a claim against the Council or the Association for breach of a purported fiduciary duty to monitor the Retirement Board, he must first adequately plead a breach of fiduciary duty against the Retirement Board itself. "A claim for breach of the duty to monitor requires an antecedent breach to be viable," and "[w]ith no antecedent breach by the monitored parties in this case . . . [the] duty to monitor claim fails." *In re Bear Stearns*, 763 F. Supp. 2d at 580. As set forth later in this opinion, the Court finds that Hudson's claims against the Retirement Board are legally insufficient, providing yet another basis to dismiss his claims against the Council and Association.

2. The Complaint Fails to Plausibly Allege Any Breach of the Council's Duties

Because the Court has determined that the Council's ERISA fiduciary duties do not extend to liability for the Retirement Board's substantive decisions, and therefore the Council cannot have liability, it need not address the remainder of the parties' arguments. However, it is worth noting that Hudson's claims would nevertheless fail as a matter of law because there is no allegation that the Council breached any duty it actually had.

As explained, the Council's obligations were limited to exercising its specified responsibilities under the Plan; namely, appointing or removing three members of the Retirement Board. (Plan at 30, Article 8.1.) *See Sommers Drug Stores*, 793 F.2d at 1459-60 ("[A] person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control. For example, if an employer and its board of directors have no power with respect to the plan other than to appoint the plan administrator and the trustees, then their fiduciary duty extends only to those functions") (internal citations omitted).

It is undisputed that the Council did, in fact, appoint three members to the Retirement Board. The Complaint does not allege that this duty was undertaken recklessly, or without the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Nor is there an allegation that the Council's appointees were unqualified for the positions or negligent because they failed to appear for meetings. In other words, to the extent that the Council had fiduciary duties under the terms of the Plan, it *fulfilled*

those duties. The Council's representatives merely made a decision contrary to Hudson's wishes.[12]

As for monitoring, the Complaint does not allege that the Council failed to monitor in a manner that falls within the limited scope of that duty. For instance, the Complaint does not allege that the Council failed to monitor whether its appointed members to the Retirement Board attended meetings, cast votes, or otherwise carried out their other duties. Rather, Hudson alleges that the Council failed to monitor and take action with respect to the Retirement Board's substantive decision not to upgrade Hudson's benefits. Once again, however, appointing parties are not fiduciaries with respect to the decisions made by the trustees. The Council cannot have breached a duty it did not have. Hudson has failed to plead facts to show any breach of the Council's fiduciary duties. Accordingly, all claims against the Council should be dismissed.[13]

[12] For this same reason, Count IV (seeking declaratory relief with respect to the 2017 Amendment) and Count V (seeking to void a provision of the Plan) have no legal merit against the Council. Even if the Council were an ERISA fiduciary, the terms of the Plan merely give it the power to appoint three members of the Retirement Board—not substantively interpret, apply, or enforce provisions of the Plan.

[13] The Council (and the Association) additionally argue that neither should be held liable for failing to intervene in Hudson's reclassification determination because neither alone could have changed the outcome, given that each controlled only three of the Retirement Board's seats. (*See* Council Mem. at 11; Association Mem. at 11-12.) Put differently, even if the Council and Association were ERISA fiduciaries with the responsibility to act in the best interests of beneficiaries, and even if that meant taking every step to support Hudson's position, neither had the unilateral ability to direct the Retirement Board's individual determinations under the terms of the Plan. The Court is skeptical of this argument, since it would allow both entities to evade responsibility for their inaction by pointing the finger at the other. However, because the Court finds other reasons for dismissing the claims against the Council and Association, it need not further address this argument.

B. Claims Against the Association Should be Dismissed

The Complaint alleges three causes of action against the Association—the players' union that, together with the Council, collectively bargained the Plan. (Complaint ¶ 12; Association Mem. at 1.) Hudson's allegations against the Association are essentially identical to his allegations against the Council. They are similarly predicated on the allegation that the Association's ERISA fiduciary duties under the Plan include a duty to monitor the decisions of the Retirement Board. Specifically, Count III asserts that the Association breached its fiduciary duty under 29 U.S.C. §§ 1110(a) and 1104(a)(1)(A)-(B) by failing to monitor the actions of the members of the Retirement Board that it appointed. Count IV seeks invalidation of the 2017 Amendment, to the extent it applies to the Plan retroactively against Hudson or the putative class members. Count V asserts that the Plan wrongfully relieves the fiduciaries from responsibility in violation of 29 U.S.C. §§ 1110(a) and 1104(a)(1)(A)-(B).

Just as the Council lacks the fiduciary obligations Hudson accuses it of breaching, so too does the Association. The Association did not serve as a Plan fiduciary for purposes of benefit reclassification decisions and therefore cannot be liable for the Retirement Board's substantive decisions in that regard. As with the claims against the Council, the claims against the Association should be dismissed.

1. The Association's ERISA Fiduciary Duties Do Not Extend to Benefit Reclassification Decisions, Precluding Liability

For the Association to have any liability under ERISA, it must be an ERISA fiduciary of the Plan. *In re Bear Stearns*, 763 F. Supp. 2d at 566. The Association is not a named fiduciary; rather, the Plan explicitly states that only the Retirement Board is the "named fiduciary" with "full and absolute discretion" over the Plan. (Plan at 30, Article 8.2.)

To the extent that the Association is a *de facto* fiduciary under the Plan, its fiduciary duties are limited only to its functional responsibilities. Beyond the power to appoint and remove three members of the Retirement Board, the Association—like the Council—had no broader "control" or "authority" over the Plan. *Worldcom,* 262 F.Supp.2d at 757. The Complaint does not allege that the Association exercised any "management … [or] administration" of the Plan beyond its appointment of three members to the Retirement Board. *Id.* ("ERISA defines a fiduciary 'in *functional* terms of control and authority over the plan'") (internal citations omitted); *Cress*, 2008 WL 5397580, at *3 (same); *see generally* 29 U.S.C. § 1002(21)(A).

Whatever control the Association has over the Plan through collective bargaining with the Council is not a "fiduciary act" for purposes of ERISA liability. *Amax*, 453 U.S. at 336; *see also United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1268 (7th Cir. 1985) ("a union is not a fiduciary while, or merely because, it is negotiating the terms and conditions of future pension benefits"); *Maldonado*, 1990 WL 17635, at *5 ("[A] union engaged in negotiating the terms and conditions of future benefits cannot be regarded as an ERISA fiduciary in respect of plans in place").

And, just like the Council, the Association is an appointing party for a multi-employer plan and is therefore prohibited from directing or supervising the decisions of the appointed board members.[14] *See* 29 U.S.C. § 186; *Amax*, 453 at 329-30 (applying

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[14] In opposition, Plaintiff cites cases arising in the context of single-employer plans. (*See* Pl. Mem. at 34-36.) In single-employer plans, the plan's sponsor (the employer) maintains authority over the trustees whom it appoints, whereas in multi-employer plans, they are explicitly prohibited from doing so. *See Amax*, 453 U.S. at 330 (discussing requirement of trustee independence); *DeCarlo v. Rochester Carpenters Pension, Annuity, Welfare & S.U.B. Funds*, 823 F. Supp. 115, 118–19 (W.D.N.Y. 1993) (concluding that trustees of multi-employer plan have "exclusive authority and discretion to manage and control the

LMRA); *Rothstein*, 837 F.3d at 209 (discussing importance of trustee independence). Accordingly, the Association's fiduciary duties under ERISA do not create liability for the substantive decisions reached by the Retirement Board. All claims against it should be dismissed.

2. <u>The Complaint Fails to Plausibly Allege Any Breach of the Association's Duties</u>

Because the Court has determined that the Association's ERISA fiduciary duties do not extend to liability for the Retirement Board's substantive decisions, and therefore the Association cannot have liability, it need not address the remainder of the parties' arguments. However, Hudson's claims would nevertheless fail as a matter of law because, as with the Council, there is no allegation that the Association actually breached any specific duty that it did have.

Hudson alleges that the Association "had the fiduciary responsibility to monitor the Retirement Board as an entity . . . and remedy any fiduciary violations committed by the Retirement Board." (Complaint ¶ 12.) He further alleges that the Association had a duty to "require the Board" to take certain steps, including "revis[ing] the [Plan]," "disclos[ing]" interpretations of Plan terms, "utiliz[ing] [certain] definitions" of Plan terms, and "review[ing] and reevaluat[ing]" prior claims for reclassification. (Complaint ¶ 94.)

As the terms of the Plan make clear, however, the Association does not actually have any of these powers. The "full and absolute discretion" lies solely with the Retirement

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[Plan] . . . solely in the interests of the participants and beneficiaries"). Indeed, there are compelling public policy reasons, discussed above in connection with the Council, that trustees of multi-employer plans must exercise their fiduciary duties independent of the entities that appointed them.

Board (Plan at 30, Article 8.1), as the Complaint itself acknowledges. (Complaint ¶ 13.) Without discretion over the Plan's "management … [or] administration" (29 U.S.C. § 1002(21)(A)), the Association did not have the unilateral ability to revise the Plan or affect particular decisions under the Plan for an individual such as Hudson, even if the Association wanted to intervene in Hudson's reclassification request. (*See* Association Mem. at 9-10).

As an appointing entity, the Association had at most a limited duty "to ensure that the appointees are performing their fiduciary obligations." *Liss*, 991 F. Supp. at 311. But Hudson does not allege any act or omission by the Association that would violate the limited duties it had. The Complaint does not, for example, allege that the Association appointed unqualified trustees to the Retirement Board. Indeed, Hudson concedes that he is not alleging that "the persons appointed to the Retirement Board were unqualified when appointed." (Pl. Mem. at 37, n.20.) The Complaint also does not allege that the Association's appointees failed to attend meetings, cast votes, or otherwise execute their functions as trustees. Nor does Hudson allege any particular defects in the Association's monitoring process.

Accordingly, Hudson fails to allege a breach of any fiduciary duty that the Association actually had, and all claims against the Association should be dismissed.[15]

C. <u>Claims Against the Retirement Board Should Be Dismissed</u>

Now that the Court has disposed of the claims against the Council and Association, it turns to Plaintiff's allegations that the Retirement Board violated ERISA and its fiduciary

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duties under ERISA and that the Plan should be reformed as a result.[16] (*See* Complaint, Counts I, II, IV and V.) The Court concludes that all claims against the Retirement Board should be dismissed.[17]

1. <u>The Retirement Board is an ERISA Fiduciary</u>

As explained above, fiduciary status is a predicate for liability under ERISA. *In re American Express Company ERISA Litigation*, 762 F. Supp. 2d at 624. The Plan specifically identifies the Retirement Board as its "named fiduciary" and administrator with "full and absolute discretion" over the Plan. (Plan at 30, Article 8.2.) Moreover, the Retirement Board acted in a manner that renders it a *de facto* fiduciary—overseeing management of the Plan, interpreting Plan policies, and otherwise administering the Plan in its entirety. *See* 29 U.S.C. § 1002(21)(A) (describing functional roles of ERISA fiduciaries). Accordingly, the Retirement Board is an ERISA fiduciary of the Plan, subject to liability for breaches of any fiduciary duties.

2. <u>Hudson's Claims Against the Retirement Board with Respect to the Summary Plan Description Fail as a Matter of Law</u>

Count I of the Complaint alleges that the Retirement Board breached 29 U.S.C. § 1022(a) by not explaining its interpretation of two aspects of the Summary Plan Description's provisions on disability reclassification: first, the phrase "clear and convincing evidence" (Complaint ¶¶ 70-71), and second, the "changed circumstances"

[16] The Complaint names both the Retirement Board as an entity and its six Individual Members. (Complaint at ¶¶ 13-20.) The Retirement Board and the Individual Members are both represented by the same counsel, and moved together for dismissal. (Dkt. 54-57.) In opposition, Plaintiff addressed the arguments relating to the Retirement Board and Individual Members together. (Pl. Mem. at 5.) The Court, too, analyzes their motion collectively.

requirement. (Complaint ¶¶ 74-75.) This claim is premised upon an overbroad interpretation of ERISA's requirements for the contents of summary plan descriptions under 29 U.S.C. § 1022. Additionally, it is barred by the applicable statute of limitations. Count I therefore should be dismissed.

a. Count I Is Premised on a Faulty Interpretation of 29 U.S.C. § 1022

Count I alleges that the Retirement Board should be held liable because the Summary Plan Description failed to properly apprise participants such as Hudson of the standards by which potential requests for reclassification would be evaluated—a failure that Hudson claims violates 29 U.S.C. § 1022. (Complaint ¶¶ 5, 80.) This claim stretches ERISA's requirements beyond their bounds.

ERISA mandates that a summary plan description "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a). A summary plan must contain, among other information, "the plan's requirements respecting eligibility for participation and benefits," and the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b). The Code of Federal Regulations interpreting this provision notes that ERISA's focus is meant to ensure that summary plan descriptions "accurately reflect the contents of the plans" that are most material to participants. 29 C.F.R. § 2520.102-3 (2018) (listing required information to be contained in summary plan descriptions).

No part of 29 U.S.C. § 1022 requires plan fiduciaries to disclose discretionary interpretations of plan terms, or requires that summary plan descriptions must summarize

every standard under which plan terms may be evaluated. *See McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 194 (2d Cir. 2007) (rejecting argument that the defendants violated 29 U.S.C. § 1022 by not including in a summary plan description the actuarial assumptions used for calculation of early retirement benefits, and holding: "[N]either ERISA nor the Labor Department's regulations require a summary plan description to describe or illustrate every method by which a plan benefit may be limited under an early payment option or similar such limitation."). Rather, courts find that 29 U.S.C. § 1022 has been violated in more drastic situations where a summary plan description fails to disclose the actual material terms of the plan. *See, e.g.*, *Frommert v. Conkright*, 738 F.3d 522, 532 (2d Cir. 2013) (finding a violation of 29 U.S.C. § 1022 where "the [summary plan descriptions] fail[ed] to clearly identify the circumstances that [would] result in an offset" under the plan); *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103, 111 (2d Cir. 2003) (holding that summary plan description violated 29 U.S.C. § 1022 where it did not disclose a threshold eligibility requirement stated in the plan itself).

Here, Hudson invoked Article 5.5(b) of the Plan, which allows reclassification of a prior final decision on a participant's benefit category if a participant is able to present "clear and convincing evidence" of "changed circumstances" that qualifies him for a higher category of benefits. (Complaint ¶¶ 28, 35.) With his request for reclassification, Hudson attempted to show that his disability was caused by NFL football activities. (Complaint ¶¶ 35-37; *see also*, Junk Decl., Ex. B.) In May 2015, the Retirement Board denied Hudson's reclassification request. (Complaint ¶ 38.) In its decision letter, it explained that it interprets the reclassification provision's "changed circumstances" requirement to mean

a new or different impairment, as opposed to new evidence or new arguments about the same impairment(s) that led to an initial benefits determination. (Quitt Decl., Ex. B.)

The Retirement Board argues—and the Court agrees—that the Summary Plan Description that describes the process for reclassification comports with the requirements of 29 U.S.C. § 1022 as a matter of law. The Summary Plan Description juxtaposes the Plan's standards for initial classification decisions against the separate reclassification standard, and in doing so, reasonably informs participants such as Hudson that a higher standard applies to reclassification. (Board Mem. at 14-15.) Indeed, the Summary Plan Description describes the reclassification rules in a different section, and states that requests for reclassification must present "clear and convincing" evidence of "changed circumstances." (Junk Decl., Ex. B at 18.)

After explaining each of the four categories of disability benefits, the Summary Plan Description has a heading entitled, "Initial Classification" noting that a participant's initial classification would be "determined by the Disability Initial Claims Committee or the Retirement Board based on all of the facts and circumstances in the administrative record." (*Id*.) Under a separate "Reclassification" heading, the Summary Plan Description states: "As long as you remain totally and permanently disabled, you will continue to receive total and permanent disability benefits under the category for which you first qualify, *unless you present evidence for reclassification* that the Disability Initial Claims Committee or the Retirement Board finds to be clear and convincing. You must be able to demonstrate that, *because of changed circumstances*, you satisfy the conditions of eligibility for a benefit under a different category of total and permanent disability benefits." (*Id*.) (emphasis added.) In other words, the text and format of the Summary Plan

Description both indicate to a participant that the standard is heightened when making a reclassification request.

Moreover, as the Retirement Board emphasizes in its moving papers, its interpretation of these specific terms has been adopted as "reasonable" by two federal district courts considering similar player lawsuits. *See Boyd v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 796 F. Supp. 2d 682, 693 (D. Md. 2011) ("[T]he entity to which deference is owed—the Board—has adopted a . . . reasonable interpretation. The Board's interpretation does not violate the ordinary meaning of the term 'changed circumstances,' and it is not contrary to any other provision in the Plan. In addition, [the plaintiff] has not shown that, in the past, the Board construed 'changed circumstances' in a different manner. Accordingly, the Board did not abuse its discretion in interpreting the terms of the Plan."); *Bryant v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, No. 1:12-cv-936 (N.D.G.A., March 23, 2015) ("[T]his Court concurs with the decision of the *Boyd* court that the Plan's interpretation of the term 'changed circumstances' as meaning a change in physical condition is within the authority of the Plan and reasonable.").[18] While not binding in the Second Circuit, these district courts' interpretations of the identical provision are certainly persuasive here.

In opposition, Hudson does not distinguish the analysis of either the *Boyd* or *Bryant* decisions. Moreover, Hudson does not cite any analogous case where a court has found that a plan fiduciary could be held liable under ERISA because the summary plan description failed to disclose a discretionary interpretation of an internal standard of

[18] A copy of the Order in *Bryant v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, No. 1:12-cv-936 (N.D.G.A., March 23, 2015) is annexed to the Declaration of Michael Junk as Exhibit C. (Dkt. 56-9.)

review. That is no surprise. As a practical matter, the level of disclosure that Hudson seeks to inject into 29 U.S.C. § 1022 would be unworkable. If summary plan descriptions were required to include interpretations of all conceivable disputes or ambiguities, it would be virtually impossible to author a summary plan description, or a plan document itself, entirely free from the need for interpretation. There also would be no need for the internal review structure that (in this case) includes the Initial Claims Committee and the Retirement Board.

In short, the Summary Plan Description provided adequate notice to Hudson and other participants that the Retirement Board would use a different standard for reclassification than for initial classification. Because ERISA does not mandate broader disclosures for summary plan descriptions in these circumstances, Count I does not state a claim for which relief can be granted.[19]

b. Count I is Time-Barred

Count I asserts a claim under 29 U.S.C. § 1022 in connection with alleged deficiencies in the Summary Description Plan, specifically that the Summary Description Plan failed to apprise Hudson of the standards under which his request for reclassification would be reviewed. ERISA itself does not provide a limitations period for actions brought to enforce its provisions, other than the provision regarding fiduciary duties under 29

[19] Tellingly, the Complaint does not allege that Hudson actually read the Summary Plan Description at the time he received it or any time since then. The Complaint also does not allege his understanding of its terms at that time, nor does it allege how his conduct was affected by his understanding of those terms. Would he have sought reclassification differently, or presented different evidence, had he had a different understanding of the Retirement Board's standard of review? The absence of these sorts of concrete allegations—combined with the procedural history of Hudson's many attempts for reclassification—suggests a *post hoc* justification for this claim.

U.S.C. § 1104. Accordingly, this Court must look to the most closely analogous statute of limitations under state law. *Guilbert*, 480 F.3d at 148-149. After the Supreme Court's decision in *Amara*, federal courts in this district have applied a three-year statute of limitations to claims relating to summary plan descriptions under 29 U.S.C. § 1022. *See Amara*, 563 U.S. at 436; *Osberg II*, 907 F. Supp. 2d at 533 ("[T]he appropriate limitations period is the three-year period governing statutory violations.").

Hudson's lawsuit was brought on May 21, 2018. Consequently, his claim under 29 U.S.C. § 1022 would be barred if he knew or reasonably should have known about the Retirement Board's interpretation of the reclassification provision prior to May 21, 2015. Hudson alleges that he first learned about the Retirement Board's standards for evaluating his reclassification request when he received a denial letter on May 27, 2015. (Complaint ¶¶ 38-39) ("In its denial, Retirement Board—for the first time—provided Hudson with a written explanation of how it interprets 'changed circumstances.' This explanation was never conveyed to Hudson in any way prior to the final denial."); *see also* (Quitt Decl., Ex. B.) (denial letter from Retirement Board).

However, the procedural background of this dispute tells a different story, and makes clear that Hudson had constructive knowledge of the Retirement Board's interpretations of the evidentiary standard far earlier than the 2015 letter. In 2011, the federal district court in *Boyd*, discussed *supra*, issued a published decision that upheld the Retirement Board's interpretation of the "changed circumstances" requirement for reclassification in the identical Plan. 796 F. Supp. 2d at 692-93 ("The Board's interpretation [to require a change in physical condition] does not violate the ordinary meaning of the term 'changed circumstances,' and it is not contrary to any other provision

in the Plan. In addition, Boyd has not shown that, in the past, the Board construed 'changed circumstances' in a different manner. Accordingly, the Board did not abuse its discretion in interpreting the terms of the Plan.").

The existence of a public governmental or judicial decision can serve to put parties "on notice" of the decision's factual and legal conclusions, particularly when a party is represented by counsel. *See, e.g.*, *United States v. Regan*, 713 F. Supp. 629, 640 (S.D.N.Y. 1989) ("chorus of judicial opinions should have put defendants on notice" of potential liability); *Weber v. Geffen Records, Inc.*, 63 F. Supp. 2d 458, 465 (S.D.N.Y. 1999) (finding that copyright plaintiff "should have been aware of an infringement clearly stated on a public document integral to one of his then-existing infringement claims" and that such "constructive knowledge" bars lawsuit under applicable statute of limitations); *Hutton v. Deutsche Bank AG*, 541 F. Supp. 2d 1166, 1171 (D. Kan. 2008) (plaintiff's claims were barred by statute of limitations where IRS published a document that would have put the plaintiff on notice of his claim).

This presumption is particularly strong in the context of this dispute. As the Retirement Board emphasizes, Hudson was represented by counsel during his extensive administrative process seeking reclassification. (Junk Decl., Ex. E, Letter from Robert Donati to Paul Scott dated March 27, 2015). The fact that counsel was actively representing Hudson in claims virtually identical to the ones in *Boyd* undermines any argument that Hudson was not, or should not have been, fully aware of the Retirement Board's interpretation of the standard for reclassification. *See Soto v. Barnitt*, No. 00 Civ. 3453, 2000 WL 1206603, at *2 (S.D.N.Y. Aug. 23, 2000) ("an attorney's unfamiliarity with the law cannot justify tolling"); *GMA Accessories, Inc. v. BOP, LLC,* 765 F. Supp. 2d 457,

467 n.2 (S.D.N.Y. 2011) (counsel cannot "claim ignorance" of adverse authority when they represented a party in the case that generated it).

In short, Hudson had constructive notice of the Retirement Board's position prior to May 21, 2015. Accordingly, his attempt—more than three years later—to challenge the terms of the Summary Plan Description on that basis is untimely.

3. Count II Fails for the Same Reasons as Count I

Count II alleges that the Retirement Board had "an affirmative duty" to disclose its interpretation of the phrase "changed circumstances" from the Summary Plan Description and that its failure to disclose that information was a breach of the fiduciary duties of loyalty and prudence under 29 U.S.C. § 1104. (Complaint ¶¶ 81-88.) As with Count I, Count II fails to state a claim, is time barred, and cannot survive as a matter of law.

a. ERISA Does Not Permit Additional Liability for Breach

Count II essentially takes allegations made in Count I with respect to the deficiencies of the Summary Plan Description, and reframes them as violations of the Retirement Board's fiduciary duties under 29 U.S.C. § 1104, rather than as violations of the specific ERISA provision on summary plan descriptions under 29 U.S.C. § 1022.

The Retirement Board cites several cases for the proposition that ERISA's fiduciary duties provision does not create new or different responsibilities than the responsibilities described elsewhere in the statute. *See, e.g.*, *Weiss v. CIGNA Healthcare, Inc.*, 972 F. Supp. 748, 753-55 (S.D.N.Y. 1997) (rejecting plaintiff's arguments for separate and duplicative disclosure responsibilities for plan administrator under 29 U.S.C. § 1104, noting that "the general language of a statute 'will not be held to apply to a matter specifically dealt with in another part of the same enactment' [quoting *Clifford F. MacEvoy*

Co. v. United States, 322 U.S. 102, 107 (1944)], particularly in the case of 'a reticulated statute such as ERISA' [quoting *Bigger v. American Commercial Lines,* 862 F.2d 1341, 1344 (8th Cir. 1988); *see also*, *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 657 (4th Cir. 1996) (rejecting argument "that ERISA's general fiduciary duty provision requires plan fiduciaries to furnish documents to participants [beyond] the documents that ERISA's specific disclosure provisions requires"); *Board of Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 147 (2d Cir. 1997) (same). In other words, if an ERISA fiduciary has met its obligations under the various specific provisions of the statute, such as 29 U.S.C. § 1022, then 29 U.S.C. § 1104 does not create some sort of broader fiduciary liability for identical acts or omissions.

The Court agrees. It would make little sense to hold that the Retirement Board met ERISA's relatively limited requirements for the contents of summary plan descriptions, yet nevertheless breached its fiduciary duties under 29 U.S.C. § 1104 by failing to disclose its interpretations of those provisions. This would violate the well-known principle of statutory interpretation that specific statutory terms govern over general ones. *See, e.g.*, *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) ("it is familiar law that a specific statute controls over a general one"); *Natofsky v. City of New York*, 921 F.3d 337, 345 (2d Cir. 2019) ("It is an established canon of construction that a specific provision 'controls over one of more general application'") (internal citations omitted); *Proujansky v. Blau*, No. 92 Civ. 8700, 2000 WL 98382, at *11 (S.D.N.Y. Jan. 28, 2000) ("While violations of . . . specific ERISA provisions may also be regarded as violative of the general fiduciary duties covered by [29 U.S.C. § 1104]," conduct that does not violate a specific requirement will not be found to violate the general fiduciary requirements).

In short, Count II cannot survive for the same reason that Count I cannot survive: 29 U.S.C. § 1022 does not require the Retirement Board to disclose discretionary interpretations of the Summary Plan Description. Therefore, the Retirement Board also had no fiduciary duty to undertake such disclosure under 29 U.S.C. § 1104.

b. Count II is Time-Barred

Count II seeks liability based on the Retirement Board's alleged breach of its fiduciary duties pursuant to 29 U.S.C. § 1104. Accordingly, the limitations period is governed by ERISA's "Limitations of Actions" provision applied to claims for breach of fiduciary duty. 29 U.S.C. § 1113. Briefly put, that provision generally bars claims for breach of fiduciary duty for a breach that took place more than six years prior to initiation of the action. *Caputo*, 267 F.3d at 190 (applying limitations period).

Here, Hudson alleges that the Retirement Board breached its fiduciary duties well before the six-year limitations period. The Complaint alleges that "The Board Defendants had an affirmative duty [under 29 U.S.C. § 1104] to disclose that the term 'changed circumstances' had been interpreted in a specific manner by the Board in advance of the time that Plaintiff and the Class filed their initial claim for benefits seeking a determination of disability benefits under the Plan." (Complaint ¶ 84.) Hudson applied for benefits on March 9, 2010. (Complaint ¶ 32.) Presumably, he had access to the Plan and Summary Plan Description well before that date as a long-time participant. (*See* Complaint ¶ 10.) Regardless, even taking his benefit application date as the beginning of the period from which he alleges a breach of fiduciary duty, he would have had six years—until March 9,

2016—to file his action. Yet Hudson did not file this action until more than two years after that on May 21, 2018.[20] (Dkt. 1.)

In opposition, Hudson argues that the "fraud and concealment" exception to the normal statute of limitations should apply here. *See* 29 U.S.C. § 1113; (Pl. Mem. at 30-33.). Hudson asserts that his claim is not precluded because the Retirement Board's interpretation of the relevant terms was allegedly concealed from him until his final denial for reconsideration on May 21, 2015 (Complaint ¶ 38; *see* Quitt Decl., Ex. B.)

But the Complaint does not sufficiently allege the purposeful concealment required to invoke the exception. As the Retirement Board correctly observes, courts require that allegations of fraud and concealment under this provision be plead with specificity. (Board Reply at 6-8); *see Osberg v. Foot Locker, Inc.*, 862 F. 3d 198, 210-11 (2d Cir. 2017) ("As we noted in *Caputo*, application of the concealment exception requires that in addition to alleging a breach of fiduciary duty . . . [a plaintiff must] also allege that the defendant committed either: (1) a self-concealing act—an act committed during the course of the breach that has the effect of concealing the breach from the plaintiff; or (2) active concealment—an act distinct from and subsequent to the breach intended to conceal it.") (quoting *Caputo*, 267 F.3d at 189 (2d Cir. 2001)). Put differently, plaintiffs must plead allegations of fraud or concealment with particularity and allege either that the fiduciary engaged in conduct to keep the breach concealed from the plaintiff, or that the fiduciary engaged in some subsequent act to hide that breach. *Caputo*, 267 F.3d at 191 (finding

[20] The result is unchanged if the beginning date were calculated from May 20, 2011, the date of the Retirement Board's final determination on Hudson's initial T&P benefits application. (Complaint ¶ 33.) Even assuming this was the relevant date—as the moment when the Retirement Board formally applied its allegedly improper and undisclosed interpretation of its standard of review—this 2018 action would still be a year too late.

that "requisite particularity" for fraud claim is required). The Complaint alleges no such conduct. There is no basis to apply the exception contained in 29 U.S.C. § 1113(B)(2).

Because this action was filed more than two years after the last possible date of the claim permitted under 29 U.S.C. § 1113, Count II is time-barred and should be dismissed as a matter of law.

4. Counts IV and V Must Be Dismissed

The bulk of the claims against the Retirement Board are centered on Hudson's allegations that the Retirement Board violated ERISA and its fiduciary duties under the Plan by failing to define "clear and convincing evidence" and "changed circumstances," thereby "lock[ing] [Plaintiff] into a lower category of benefits." (Complaint ¶¶ 67-88.) But the Complaint also includes Counts IV and V, which allege somewhat unconnected grievances relating to modifications of the Plan or other retirement benefits. These two claims add additional collateral attacks to the current structure of the Plan, apparently in service of Hudson's request to have this Court replace the Retirement Board or otherwise insinuate wrongdoing. However, there is no alleged connection between Counts IV and V and any actual harm that Hudson alleges to have suffered, namely that he should be entitled to a higher level of T&P benefits. Moreover, they are subject to the same exhausted limitations periods as his prior claims. Accordingly, Counts IV and V should be dismissed.

a. Count IV Fails to Allege Injury-In-Fact

Count IV seeks a declaration that a 2017 Amendment to the NFL Player Disability & Neurocognitive Benefit Plan does not apply to Hudson or other members of the putative class. (Complaint ¶ 101.) The 2017 Amendment, however, relates to a *separate* benefit

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plan from the Plan of which Hudson is a beneficiary (namely, the Bell/Pete Rozelle NFL Player Retirement Plan). (Complaint ¶ 21.) Hudson does not allege that he is a beneficiary of the NFL Player Disability & Neurocognitive Benefit Plan, either before or after the 2017 Amendment. It is undisputed that his benefits are paid by the Plan, all his reclassification requests were under the Plan, and all decisions to which he objects were rendered by the Initial Claims Committee and Retirement Board. (Complaint ¶ 36.) The allegedly deficient Summary Plan Description relates only to the Plan. (*See* Complaint ¶ 10) (alleging that Hudson is a participant in "the Plan"). Hudson claims that he received a notice of a summary of material modifications to the NFL Player Disability & Neurocognitive Benefit Plan in February 2018. (Complaint ¶ 47.) This notice informed him that "[t]he standard for reclassifying [participants'] total and permanent disability benefits" had changed, including the standard as to what constitutes "changed circumstances." (*Id.*) But he does not allege any ways in which this change might affect him, given that the changes are to a plan that does not include him.

In short, Hudson fails to allege any injury in fact in Count IV. As a result, he does not have constitutional standing to assert that claim. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services., Inc.*, 528 U.S. 167, 180-81 (2000) (to establish constitutional standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("Plaintiff must have suffered an injury in fact . . . which is actual or imminent, not conjectural or

hypothetical.'") (internal quotations and citations omitted); *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112, 121 (2d Cir. 2009) (abrogated on other grounds by *American Psychiatric Association v. Anthem Health Plans, Inc.*, 821 F.3d 352, 357 (2d Cir. 2016)) ("[a plaintiff] cannot claim that either an alleged breach of fiduciary duty to comply with ERISA, or a deprivation of [his] entitlement to that fiduciary duty, in and of themselves constitutes an injury-in-fact sufficient for constitutional standing").

In opposition, Hudson cites *Loren v. New York City Department of Education*, 2015 WL 3917490, at *6-7 (S.D.N.Y. June 25, 2015) for the proposition that "harm can be established indirectly or by circumstantial evidence." (Pl. Mem. at 13.) This may be true, but Hudson has not alleged any facts that would plausibly establish or even give rise to actual harm.[21]

Hudson has not plausibly alleged any injury traceable to any act or omission involving the NFL Player Disability & Neurocognitive Benefit Plan or the 2017 Amendment. There is no causal connection alleged between any aspect of the 2017 Amendment and Hudson himself. Without sufficient allegations of harm, Count IV fails as a matter of law. Accordingly, it should be dismissed.

b. <u>Count V is Time-Barred and Fails to Allege Injury-In-Fact</u>

Count V of the Complaint seeks to void the Plan's limitations provision, located at Article 11.7(b), on the theory that the provision itself (and the part of the Summary Plan

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[21] Hudson points to the fact that the Retirement Board members are identical for both the Plan affecting Hudson and the NFL Player Disability & Neurocognitive Benefit Plan (Complaint ¶ 49.) But this overlap does not create any shared interest of Hudson in the entirely separate benefits plan.

Description describing it) violate 29 U.S.C. §§ 1022, 1104, and 1110 of ERISA. Article 11.7(b) provides:

> Except as provided in Section 11.7(a) [regarding claims for benefits], no action alleging an omission, violation, or breach of any responsibility, duty, or obligation imposed by this Plan (or any internal rule, guideline, or protocol) or any applicable law may be commenced after the earlier of—
>
> (1) six years after the date of the omission, violation, or breach, or
> (2) three years after the earliest date on which the plaintiff had actual or
>
> constructive knowledge of the omission, violation, or breach, except as provided in ERISA section 413 (but only where the fraud or concealment is separate from the offense and intended to conceal the existence of the offense).

(*See* Junk Decl., Ex. A, Plan at 43.)

The Summary Plan Description describes these limitations provision as follows:

> With respect to all other types of claims [i.e., other than a claim for benefits], you may not commence a legal action in a court after the earlier of—
>
> - six years after the date of any omission, violation, or breach of any responsibility, duty, or obligation imposed by the Retirement Plan or applicable laws, or
> - three years after the earliest date that you knew or should have known of any such omission, violation, or breach, except that, depending on the facts, certain exceptions may apply.
>
> If you do file a legal action after these limitations periods have expired, the court may dismiss your claim.

(*See* Junk Decl., Ex. B at 38.)

Hudson's Count V is plainly time-barred. Hudson acknowledges that the above-language was included in both the Plan and Summary Plan Description since at least 2009 and 2010, respectively. (Complaint ¶¶ 104-06.) Hudson filed this litigation in 2018. (Dkt. 1.) As the Court has already discussed, ERISA claims are governed by strict statute of limitations periods. Claims under 29 U.S.C. § 1022 (relating to summary plan descriptions) are governed by a three-year statute of limitations. *See Osberg II*, 907 F.

Supp. 2d 527, 533 ("[T]he appropriate limitations period is the three-year period governing statutory violations.") Claims under 29 U.S.C. § 1104 are governed by a six-year statute of limitations. 29 U.S.C. § 1113 (stating that claims relating to breaches of fiduciary duty must be brought within six years of the breach, or three years of plaintiff's knowledge of the breach, whichever is earlier). Accordingly, any claim under 29 U.S.C. § 1022 should have been brought by 2013 (3 years after 2010) at the latest. Any claim under 29 U.S.C. § 1104 should have been brought by 2015 (six years after 2009) at the latest. Hudson's Count V claim is therefore time-barred. Count V cannot survive as a matter of law and should be dismissed.[22]

Conclusion

For the foregoing reasons, I recommend that Defendants' motions to dismiss be GRANTED and the action DISMISSED with prejudice.

The parties' additional arguments not expressly addressed above have been considered by the Court and found to be without merit.

Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(d) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the Chambers of the Honorable Gregory H. Woods,

[22] Beyond arguing that Count V is time-barred, the Retirement Board and the Association argue that it should additionally fail for the same reason as Count IV: Hudson lacks constitutional standing with respect to claims concerning Article 11.7(b) or the related issues in the Summary Plan Description because the Complaint does not articulate how Hudson has been injured by either provision. (*See* Board Mem. at 22-24; Association Mem. at 18-19; *see also*, Complaint ¶¶ 102-109.) The Court does not find this argument to be as persuasive for Count V as for Count IV. However, because the Court finds that Count V is time-barred, it need not address these arguments.

United States Courthouse, 500 Pearl Street, Room 2260, New York, New York 10007, and to the Chambers of the undersigned, at United States Courthouse, 500 Pearl Street, Room 1960, New York, New York 10007. **Failure to file timely objections will result in a waiver of objections and will preclude appellate review.**

Respectfully submitted,

ROBERT W. LEHRBURGER
UNITED STATES MAGISTRATE JUDGE

Dated: September 5, 2019
New York, New York

Copies transmitted to all counsel of record.